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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-8001

AMERICAN MARITIME ASSOCIATION,

Petitioner,

v.

PETER G. PETERSON,
Secretary of Commerce, *et al.*,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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TABLE OF CONTENTS

Page

I. REFERENCE TO OPINIONS BELOW 2

II. JURISDICTION 2

III. QUESTIONS FOR REVIEW 2

IV. STATUTES ..... 3, App. A81

V. STATEMENT OF THE CASE 5

VI. ARGUMENT 8

A. THE RULE CONCERNING OPERATING SUBSIDY 11

1. The unexplained 50% exemption 14

2. The exemption of civilian preference general cargo 16

B. THE RULING CONCERNING CONSTRUCTION SUBSIDY 18

1. The 1952 amendment did not eliminate foreign-flag competition as the condition of construction subsidy 20

2. The agency interpreted the amended act to retain the foreign-competition requirement 25

3. The Court's "shipyard-subsidy" theory is in error 26

CONCLUSION 28

TABLE OF AUTHORITIES

Cases:

A-37 AEIL–ODS Application, Trade Route 5-7-8-9, 11 SRR 193 (MSB 1969) 25

American President Lines – Mechanization of Ships, 3 SRR 757 (MSB 1964) 26

American South African Line, Trade Route 14, 3 USMC 314 (1947) 25

Page

FMC v. DeSmedt, 366 F.2d 464 (2d Cir. 1966), cert. denied 385 U.S. 974, 87 S.Ct. 513 (1966) 20

FTC v. Jantzen, 386 U.S. 228, 87 S.Ct. 998 (1967) 19

FTC v. Standard Motors Products, 371 F.2d 613 (2d cir. 1967) 20

Gemsco v. Walling, 324 U.S. 244, 65 S.Ct. 605 (1944) 19

Guiseppi v. Walling, 144 F.2d 608 (2d cir. 1944) 19

Independent Bank v. FRS, 516 F.2d 1206 (D.C. Cir. 1975) 23

Maine v. CAB, 520 F.2d 1240 (1st cir. 1975) 14

United States Lines – Reconstruction Subsidy, SS UNITED STATES, 2 SRR 865 (MSB 1963) 26

A-20, War Area or Danger Zone Bonuses, 6 SRR 651 (MSB 1965) 25

Statutes:

Merchant Marine Act, 1936 as amended
§ 101, 46 U.S.C. § 1101 ..... 9, 15, App. A-81
§ 501(a), 46 U.S.C. § 1151(a) ... 3, 5, 20-28, App. A-82-84
§ 502(b), 46 U.S.C. § 1152(b) ..... 27, App. A-85
§ 503, 46 U.S.C. § 1153 ..... 28, A1
§ 505, 46 U.S.C. § 1155 27
§ 506, 46 U.S.C. § 1156 ..... 28, App. A-87
§ 601(a), 46 U.S.C. § 1171(a) .. 4, 5, 11, 22, 23, App. A-88
§ 602, 46 U.S.C. § 1172 .....4, 11, 23, App. A-89
§ 603(a), 46 U.S.C. § 1173(a) .....4, App. A-90
§ 603(b), 46 U.S.C. § 1173(b) .....4, App. A-91
§ 605(a) 46 U.S.C. § 1175(a) ..... 15, App. A-91
§ 605(c), 46 U.S.C. § 1175(c) .....17, App. A-92
§ 802, 46 U.S.C. § 1212 .....28, App. A-93
§ 901(b), 46 U.S.C. § 1241(b) ....4, 5, 11, 16, App. A-94
§ 902(b), 46 U.S.C. § 1242(b) ..... 28, App. A-96
§ 905(a), 46 U.S.C. § 1244(a) ..... 24, App. A-97

P.L. 89-127 (1965), 79 Stat. 519 25

P.L. 92-402 (1972), 86 Stat. 617 24

Page

5 U.S.C. § 557(c) 4, 14
§ 701 ..... 4, 7
§ 706 ..... 4, 7, 14

10 U.S.C. § 2631 ..... 4, 5, 11, 15, App. A.98

15 U.S.C. § 616a ..... 4, 5, 11, 15, 16, App. A-98

28 U.S.C. § § 1331, 1333, 1337 7
§ 1241 2

Shipping Act, 1916
§ 15, 46 U.S.C. § 814 17

CONGRESSIONAL REPORTS AND HEARINGS

Senate Hearings on S. 3500, 74 Cong., 2d sess. 17, 22, 23

Senate Hearings on S. Res. 50 and S. 2786, 81 Cong., 2d sess. 21

House Hearings on H.R. 15424, 91 Cong., 2d sess. [Serial No. 91-23] 27

S. Rep. 295 [To accompany S. 241], 82 Cong., 1st sess.
Part 1 21
Part 2 ..... 21, 23, 27

S. Rep. 91-1080, [To accompany H.R. 15424] 91 Cong., 2d sess. 22, 27

S. 3500, 74 Cong., 2d sess. 22

S. 4110, 74 Cong., 2d sess. 22

Conference report, H. Rep. 91-1555 [To accompany H.R. 15424] 91 Cong., 2d sess. 24, 27

H. Rep. 1407 [To accompany H.R. 5346], 81 Cong., 1st sess. 21

H. Rep. 2221, 82 Cong., 2d sess. 21

H. Rep. 214, 89 Cong., 1st sess. (1965) 25

H. Rep. 91-1073, 91 Cong., 2d sess. 27

MISCELLANEOUS

46 C.F.R. § 201 6
§ 294.3(c)(6) 15

Page

38 F.R. 12246 (1973) 15

General Order 111, 46 C.F.R. § 278 24

Manual of General Procedures SR 186:191 25

Manual of Procedures – CDS SR 210:102 25

SR 230:351 24

NOTE: EMPHASIS IN QUOTATIONS IS ADDED UNLESS OTHERWISE NOTED.

REFERENCES TO SR OR SRR ARE TO THE PUBLICATIONS PIKE AND FISCHER SHIPPING REGULATIONS AND SHIPPING REGULATION REPORTS.

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PETER G. PETERSON,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above entitled matter on September 5, 1975.

I

REFERENCE TO OPINIONS BELOW

The decision of the United States Court of Appeals for the District of Columbia appears at ____ U.S. App. D.C. ____, 518 F.2d 1070. The decision of the United States District Court is unreported. Both opinions are attached in the appendix, respectively at App. A-1 and A-29. The final opinion and order of the Maritime Subsidy Board is reported in 13 SRR 44 (MSB 1972), and is attached at App. A-33.

II

JURISDICTION

The decision below was entered September 5, 1975. Jurisdiction of the Supreme Court is invoked pursuant to 28 U.S.C. § 1254(1) and Rule 19(b). The case involves an important question of federal law which has not been, but should be, settled by the Supreme Court.

III

QUESTIONS FOR REVIEW

1. Whether, where the Merchant Marine Act, 1936 forbids payment of operating subsidy except when required to meet foreign-flag competition, and the Maritime Subsidy Board has held that it must reduce

such payment in proportion to the revenues earned from trade in which the act and other cargo-preference acts forbid foreign-flag vessels to participate, the Board is authorized –

a. to pay full subsidy under the statute if not more than one-half the annual gross revenues are earned from trade in which it is illegal for foreign-flag lines to participate; and

b. to treat as subject to foreign-flag competition a large class of cargo that foreign-flag vessels may not lawfully carry but the freight rates for which are the same that foreign vessels would charge, if they were eligible to carry it, under rate-fixing agreements between them and the American members of international shipping cartels –

where the cumulative effect of these exemptions vitiates the rule purporting to reduce subsidy and allows full payment even when subsidized lines carry annually 95% preference cargo.

2. Whether the Board correctly interpreted the statute as not requiring construction subsidy to be repaid in proportion to revenues from trade protected by law from foreign-flag competition.

IV

STATUTES

(a) Merchant Marine Act, 1936, as amended, 49 Stat. §§1985 ff., 46 U.S.C. §§1101 ff., particularly §501(a), 46 U.S.C. §1151, App. A-84, authorizing the payment by the United States under certain conditions

of construction-differential subsidy for construction of American merchant ships; §§ 601, 602, and 603, 46 U.S.C. §§ 1171, 1172 and 1173, App. A-88, 89, 90, authorizing payment under certain conditions of operating-differential subsidy for the operation of such ships; and § 901(b), 46 U.S.C. § 1241(b), App. A-94, granting preference to vessels of American registry in the carriage of cargo paid for or financed by the United States.

(b) The Act of April 28, 1904, 33 Stat. 518, 10 U.S.C. § 2631 (1964), App. A-98, granting preference to vessels of American registry with respect to military cargo.

(c) P. Res. 17, 73 Cong., 48 Stat. 500 (1934), 15 U.S.C. § 616a, App. A-98, granting preference to vessels of American registry with respect to cargo financed by the Export-Import Bank of the United States.

(d) Administrative Procedure Act, 5 U.S.C. §§ 551 ff. [hereafter APA], particularly § 7, 5 U.S.C. 556(d), (e), requiring rules and orders to be based on the record and supported by and in accordance with the reliable, probative and substantial evidence, and particularly § 8, 5 U.S.C. § 557, requiring rulings of administrative agencies to show the ruling on each controverted issue, and to state findings and conclusions, with reasons or basis therefor, on all material issues of fact, law, or discretion presented on the record; § 10(e), 5 U.S.C. § 706, requiring the reviewing court to compel agency action unlawfully withheld, and to hold unlawful and to set aside agency action, findings and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, short of statutory right, unsupported by substantial evidence, or without observance of procedure required by law.

V

STATEMENT OF THE CASE

The Merchant Marine Act, 1936 provides for the payment of construction and operating subsidies for the purpose, so far as here relevant, of meeting the competition of foreign-flag vessels in foreign trade, titles V, VI, 49 Stat. 1995, 2001, 46 U.S.C. §§ 1151 ff., 1171 ff. However, under another provision of the act and other similar statutes, cargo shipped or financed by the United States government may be carried only by vessels of American registry. These cargo-preference laws are § 901(b), Merchant Marine Act, 1936, as amended, 46 U.S.C. § 1241(b); the act of April 28, 1904, 33 Stat. 518, 10 U.S.C. § 2631 (1964 codification); P.Res. 17, 73 Cong., 48 Stat. 500 (1934), 15 U.S.C. § 616a. The first reserves 50% of cargo generated by the nation's various programs of foreign aid; the others reserve effectively 100% respectively of military cargo and cargo financed by the Export-Import Bank of the United States.

Cargo from these sources had come to dominate the services of the lines subsidized under titles V, VI since at least 1964, as the Chief Examiner of the Maritime Subsidy Board found. In the last year covered by the record, the largest subsidized line devoted over 94% of its outbound space to preference cargo in its major Gulf-Orient services, and three large West Coast operators over 80%. In the great trade routes to Europe, the Mediterranean and the Far East over 70% of the total revenue tons all subsidized lines carried in the four years of record as a whole derived from the preference statutes.

As the volume of preference cargo declined, especially military cargo to Vietnam, acute competition developed between the subsidized lines and unsubsidized carriers, in the course of which the former, cushioned by their subsidies, admittedly commenced in 1969 to bid below costs before subsidy.

On July 1, 1969, plaintiff petitioned defendants under their established procedures, 46 C.F.R. § 201, to institute proceedings for promulgating rules to limit subsidy payments for the carriage of preference cargo. Plaintiff proposed three rules, which are set out in the Maritime Subsidy Board's Notice of Hearing, 34 F.R. 19149, App. A-71. In general, these rules proposed that operating subsidy should be reduced, and construction subsidy repaid to the government, in proportion to the ratio of net preference revenue to total net revenue earned. MSB granted the petition on December 1, 1969, and instituted Docket S-244, a fact-finding hearing relative to the proposed rules.

Following extensive hearings, the agency's Chief Examiner served findings June 22, 1971, substantially sustaining plaintiff's contentions. He found that "operating differential subsidy is properly payable only for the carriage of commercial cargo" (and for a certain class of preference cargo he thought "difficult to identify as government-impelled prior to shipment"). He did not pass on the question of construction subsidy. He found that subsidized companies were concentrating on preference cargo to the neglect of commercial service. Finally, he found the existence of unfair competition that was threatening the unsubsidized fleet with imminent extinction. He recommended adoption of plaintiff's proposed rules relating to operating subsidy.

The Board rendered its own final opinion and order June 12, 1972, in which it rejected (without discussing) the Chief Examiner's report, and declined to adopt plaintiff's proposed rules. However, it held that operating subsidy is intended to place American operators in a position to compete with foreign operators, and that subsidized operations must be conducted in such a manner as not to preclude such competition; and that "payment of subsidy for operation of vessels must be governed by the degree to which the competitiveness of that operation is reflected in actual operating experience." App. A-42. The Board ordered a reduction of subsidy in proportion to the extent that "at least 50% of the gross freight revenues earned for that service are [not] earned from the carriage of commercial cargoes, conference-rated civilian preference cargoes or open-rated civilian preference cargoes carried at 'world' rates". App. A-54.

Pursuant to 28 U.S.C. §§ 1331, 1333, 1337 and 5 U.S.C. §§ 701-706, plaintiff appealed to the United States District Court for the District of Columbia, setting forth as grounds of error among other matters (1) the 50%-exemption from the requirement of foreign commercial competition, and the further exemption of preference cargoes also insulated from foreign-flag competition but the freight rates of which are subject to tariffs agreed by American carriers with international freight cartels, the effect of these exemptions being to render the pretense of subsidy reduction entirely illusory; and (2) the failure of the Board to extend the principle of subsidy reduction to construction subsidy.

The subsidized intervenors did not appeal "because of our uncertainty as to the actual extent to which the regulations will injure AIMS members." 518 F.2d at 1076 note 9, App. A-10.

The District Court, Robinson, J., going beyond the contention of any party, held that the statute does not permit any reduction of operating subsidy on account of the carriage of preference cargo. App. A-29. He therefore did not reach the other grounds of plaintiff's appeal. App. A-31 note 3.

The United States Court of Appeals for the District of Columbia circuit over-ruled the conclusion of the District Court that operating subsidy may not as a matter of law be reduced for carriage of preference cargo, holding that such reduction is proper because "The Act consistently speaks of awarding subsidies only to vessels 'meeting foreign competition' ", 518 F.2d at 1082, App. A-24, and remanded with instructions to reinstate the Board's order: "The Board's rule reducing subsidy when a vessel is not in 'substantial competition' appears to strike a sound balance between the intention of Congress and the competitive needs of the industry." Id. Plaintiff's grounds of appeal against the Board's order respecting operating subsidy were not specifically discussed in the Court's opinion, although inferentially rejected.

With respect to construction subsidy, the Court of Appeals likewise sustained the Board's refusal to require a rebate for the carriage of preference cargo, holding that the requirement of meeting foreign competition does not apply under title V as amended in 1952 and 1970. App. A-26.

VI

ARGUMENT

The questions presented are important to the proper administration of the Merchant Marine Act, 1936, upon

whose subsidy provisions, especially in relation to other sections granting cargo preference to American vessels, the Supreme Court has never pronounced. They are important to national policy governing defense and commerce by sea and crucial to shipping companies affected by the act.

The American merchant marine is a significant component of the national defense, as well as of national policy affecting foreign commerce, § 101 MMA'36, 46 U.S.C. § 1101. Upon the correct construction of the act hinges the economic fate of the major unsubsidized sector of the American merchant marine, which has represented the surge capacity of the nation at war or in emergency, and the disappearance of a large sector of which has recently been described by the Department of Defense as being of "the greatest concern".[1]

Petitioner's membership is broadly representative of the unsubsidized American fleet. On January 1, 1969,

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[1] Testimony of Deputy Assistant Secretary John J. Bennett before the House Committee on Merchant Marine and Fisheries, June 5, 1975:
"The changes in the general cargo fleet are giving us the greatest concern . . . I need to emphasize that we are concerned for the type and number of American vessels which could quickly be made available in a minor contingency situation where Allied support is absent and ship requisitioning is not possible. We are equally concerned that the total general cargo assets available to Defense for a major deployment effort, including specific NATO shipping allocations in the case of a NATO effort, are only marginally adequate to meet our needs. During the Korean and Vietnam situation, there were U.S.–flag tramp general cargo vessels available, as well as a large National Defense Reserve Fleet. Today the tramp ships are all but vanished." [Not yet printed.]

63 of its members operated 195 dry-cargo liner and tramp ships totalling over 2.5 million deadweight tons. On January 1, 1975, these had diminished to 18 companies operating 95 such ships of 1.5 million tons. Of the two remaining liner operators, one had been obliged to apply for subsidy. Thus, in the six years of the present proceeding 100 ships, a million tons of shipping, have disappeared. In the whole foreign-trade fleet only three major unsubsidized liner operators remain, of which one has also recently applied for subsidy. Virtually all break-bulk tramps have been forced out of business.

All of this has come about chiefly because of the employment of the differential subsidies, intended to meet foreign-flag competition, instead as a fighting tool against American operators not receiving them in the struggle for cargo reserved by law from foreign-flag lines.

It follows the forecast of the Chief Examiner, and indeed of the agency itself in contemporaneous forums outside its own proceedings herein.[2]

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[2] Appearing before the Federal Maritime Commission in a proceeding respecting compensatory rates for military cargo, the agency said that according to a then recent study, "military cargo rates had fallen to levels which were clearly noncompensatory on the basis of fully allocated cost and concluded further that maintenance of rates at these levels would work to the detriment of the U.S. merchant marine." 76 Congressional Information Bureau p.2 (September 12, 1972). "If these rates are allowed to remain below full costs, this instrument for gradual modernization is converted into a tool that U.S. carriers are forced to use against themselves. DOD cargo, which might have been the impetus for fostering international competition, becomes the means for destructive internal competition. This destructive competition thwarts the very intent of the national

A. THE RULE CONCERNING OPERATING SUBSIDY.

The differential-subsidy structure of the act pivots on the presence or absence of foreign-flag competition. On the one hand, it expressly forbids payment except to meet such competition. §§ 601(a), 602 MMA'36, 46 U.S.C. §§ 1171, 1172. On the other hand, the act forbids foreign-flag competition for foreign-aid cargo (furnished or financed by the United States) by reserving a fixed percentage of such cargo for American ships.[3] Read together, as statutes must be, the only natural, unforced meaning of these provisions is that subsidy may not be paid for carrying preference cargo. To pay subsidy where there is no foreign competition violates the literal prohibition against paying where there is no foreign competition.

Reinforcing this natural construction is another evidence that the act creates two separate systems of maritime assistance. The measure of the subsidy is in effect the difference in construction and operating costs

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policy of strengthening the U.S. merchant marine by restricting certain government cargoes to U.S.–flag ships." Id. "The projections . . . indicate that the U.S. merchant fleet will be inadequate to meet emergency shipping requirements in the future. These projections, however, include the excess capacity which exists at present. It is thus apparent that any elimination of presently existing excess capacity will render the fleet less adequate for use in a future national emergency." Id.

[3] § 901, MMA'36, 46 U.S.C. § 1241, reserves not less than 50%. The other preference laws reserve 100%. 10 U.S.C. § 2631 (military cargo); 15 U.S.C. § 616a (cargo financed by the Export-Import Bank).

between competing foreign and American vessels; this cost-differential subsidy is designed to equalize the disadvantages of higher-cost American operation, and theoretically to permit freight-rate competition at world levels. On the other hand, the preference statute not only excludes foreign competition, but expressly guarantees American vessels fair and reasonable freight rates compensatory at their American cost of operation. For the government to pay both the cost-differential subsidy and the compensatory freight rate is to pay, as all agree, a double subsidy. Congress cannot have intended to pay twice for the same service.

These principles were in general accepted both by the agency and the Court of Appeals. However, the former engrafted a qualification approved by the Court as signifying that vessels do not forfeit subsidy if they carry "some" preference cargo: "The Act consistently speaks of awarding subsidies only to vessels 'meeting foreign competition'. The legislative history, however, indicates that Congress had contemplated the payment of some 'double subsidies' to shippers carrying preference cargo." 518 F.2d at 1082, App. A-24.

But in giving content to the minimizing expression "some", the Board adopted a rule that exacts no reduction of subsidy from a subsidized line carrying 95% preference cargo in the last year of record (and averaging 90% for the whole period of record, 1964-1969.)[4]

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[4] On their important services the three largest subsidized lines carried the following amounts of export preference cargo in the last year of record, and none would have been subject to abatement under the agency's rule:

APL	AML	80%
Lykes	Far East	95%
	Mediterranean	86%
AEIL	Far East	82%
	Mediterranean	76%

The Board said that "payment of subsidy for operation of vessels must be governed by the degree to which the competitiveness of that operation is reflected in actual operating experience", but it proceeded first to exempt half the freights earned, and then to treat as subject to foreign competition an entire class of preference cargo that foreign operators are ineligible to carry.

Although the Court refers to the case as "a difficult and complex situation", 518 F.2d at 1083, App. A-28, judgment here does not turn on factual complexities hidden in the record, but upon errors apparent on the face of the Board's opinion to which the Court of Appeals did not explicitly direct its attention. These exemptions had the consequence not of effectuating a general statement of law otherwise perhaps unexceptionable, but of vitiating it, leaving conditions precisely where they had been before the whole protracted proceeding[5] – except that as the Court seems to recognize, at 1074 note 4, App. A-6, in the meantime a major part of the unsubsidized American merchant marine has been destroyed.

Statistics are not available for subsequent periods. The only published data are for military container cargo, and do not distinguish subsidized carriers. However, for 1970-1973, such cargo accounted for 65% of total outbound cargo of all American container carriers to the Far East and 28% to the Mediterranean.

[5] The subsidized lines did not even appeal the Board's order and sought no affirmative relief upon plaintiff's appeal.

1. The unexplained 50% exemption.

The Board ruled that "to the extent that less than a substantial portion of the gross freight revenues earned for a service are earned from carriage of cargo subject to foreign-flag competition", it would reduce operating subsidy "in proportion to the decreased gross freight revenues earned from such carriage"; but it defined "substantial portion . . . to mean 50%." App. A-43.

The opinion contained nothing more than this bare statement; the Board nowhere explains how it reached this result, which is absolutely crucial. Nothing in the record or in the statute or legislative history explains it. And it over-rules without discussing the opposite conclusion of its Chief Examiner, who recommended adopting petitioner's proposed rule of a reduction in subsidy proportioned to net revenue from non-competitive cargo. Cf. Maine v. CAB, 520 F.2d 1240, 1244-1245 (1st cir. 1975).

a. The mere omission to explain so vital a ruling violates the Administrative Procedure Act, 5 U.S.C. § 557(c), applicable in rule-making proceedings required to be decided on the record, as the Court of Appeals held this one was, 518 F.2d at 1082 and note 28, App. A-25. To give no explanation at all for a material action is itself the extreme instance of the arbitrary within the meaning of the Review Act, 5 U.S.C. § 706(ii)(A).

b. But the requirement of a reasoned explanation is the more compelling where the matter is so material that there pivots upon it whether the regulation is to be meaningful in carrying out an announced construction of law or is to be a mere dead letter from its inception. This is not a case either of de minimis non

curat praetor or of a fair division between contending interests: like the judgment of Solomon, this cut kills.

c. It is, moreover, inconsistent with the statutory goal, as interpreted by the agency, of providing a merchant marine adequate to carry 50% of our foreign trade. § 101,46 U.S.C. § 1101. If this were the only exemption it would still be necessary to subsidize a fleet twice as large as otherwise required for that purpose, while driving out unsubsidized carriers whose main function and subsistence was in the preference sphere.

d. Nor can it be reconciled with the absolute prohibition against even carrying preference cargo that the same agency has imposed on bulk carriers subsidized under the same provisions of law.[6] Even experienced shipping men cannot fathom this unexplained discrimination between the two classes.

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[6] "No cargoes are to be carried that are subject to the cargoes [sic] preference statutes including 10 U.S.C. 2631, 46 U.S.C. 1241 and 15 U.S.C. 616a." 38 F.R. 12246 (May 10, 1973). Compare also the so-called Russian wheat program, as to which the rule reads, 46 C.F.R. § 294.3(c)(6): "*Ineligible voyages.* No voyages shall be eligible for subsidy during which the subsidized bulk cargo vessel carries: *** (ii) U.S. preference cargo, including that covered by 10 U.S.C. 2631, 46 U.S.C. 1241 and 15 U.S.C. 616a . . .". This latter provision shows again the arbitrary nature of the agency's proceedings. The Court approved the Board's rule "that subsidies should be based upon the amount of competition cargo carried during the year . . . instead of . . . voyages." 518 F.2d at 1082, App. A-25. Yet here the Board refuses to subsidize any part of any voyage on which preference cargo is carried. This is actually more consistent with the act, cf. § 605(a), 46 U.S.C. § 1175(a).

2. The exemption of civilian preference general cargo.

In addition to the 50%-exemption, the Board created another broad exemption by treating as "subject to foreign-flag competition" cargo that foreign lines cannot legally carry but whose freight rates they are said to "directly influence or determine" through their membership in international freight conferences. This class of cargo, which the Board calls conference-rated, consists of non-military general cargo shipped or financed by the civilian agencies of the Government, and is therefore subject to § 901(b) or to P.Res. 17. During the period of record it represented in the major Far East trade about 25% of the total revenue tons carried as exports by the subsidized lines as a group, and 32% of their gross revenues.

The Board gives as an explanation for holding that this large class of cargo is subject to foreign-flag competition although foreign carriers are forbidden to carry it only that there is a "second category of competition . . . where only one carrier is eligible to carry the cargo but the rate at which he must carry it is directly influenced or determined by an ineligible carrier or carriers. . . . In the second case, the competition manifests itself in the effort of the eligible carrier to maintain a profitable operation while carrying cargo at rates influenced or determined by the ineligible carrier or carriers." App. A-44.

a. The Board agrees that there is here no competition in the ordinary business sense of physically procuring the cargo since the foreign carrier is ineligible to carry it. Yet competition for concrete cargo is the sense of the competition envisioned by the act.

Compare § 605(c), 46 U.S.C. § 1175(c); Senate Hearings on S. 3500, 74 Cong., 2d sess. p. 62.

b. But the supposedly competitive rates are made by the American carriers in concert with their foreign fellow members of the international carrier cartels. As the Board itself says: "Generally speaking, international commercial rate conferences are formal organizations of competing U.S.-flag and foreign-flag carriers established for the purpose of fixing rates." App. A-50. These are agreements to *eliminate* rate competition. It is not apparent how agreeing to eliminate rate competition can be regarded as being rate competition. Thus there can here be no "competition for cargo" that "manifests itself" in such competition. Since the preference statutes eliminate service competition for the cargo and the conferences eliminate rate competition, the Board's conclusion is without support.

c. The Board says that the kind of "competition for cargo" it has in mind "manifests itself in the effort of the eligible carrier to maintain a profitable operation while carrying cargo at rates influenced or determined by the ineligible carrier or carriers". App. A-44. This seems to imply that the alleged influence tends to depress rates for civilian preference general cargo below what would prevail in the absence of this "competition".

The Board makes no finding that this actually happened. The record is altogether to the contrary.

Conferences concert rates to fix them at a level higher than would prevail under competition. These are cartels inherently negatory of free competition, and legal only by express exemption from the anti-trust laws when approved by the Federal Maritime Commission. § 15, Shipping Act 1916, 46 U.S.C. § 814. The evidence of the subsidized lines was that "the

conference is certainly not trying to reduce rates unless there is a reason." Tr. 3063.

That conference rate-making for preference general cargo does not influence rate levels in a direction detrimental to American subsidized carriers is demonstrated by the fact that on average such carriers have earned their full American costs *before* subsidy in all the trades in which such cargo has moved in the years of record, including 17 distinct services.

B. THE RULING CONCERNING CONSTRUCTION SUBSIDY.

Rejection of plaintiff's contention that the statutory grant of construction subsidy also is conditioned upon meeting foreign competition likewise raises a crucial issue.

The shipping industry has for the first time become capital intensive even in the dry-cargo sector. The container-ship evolution, pioneered by unsubsidized American carriers concentrating on cargo protected from foreign competition under American law, followed later by vessel types featuring separable barges, introduced units and systems of multiplied productivity. However, capital costs have augmented in proportions only less extraordinary. In 1961 standard cargo ships cost about $11 million; in 1972, the average cost of new units ran about $34 million. For those who built with subsidy, the government absorbed about $5½ million in the former year, but $14 million in 1972; and it is understood that certain vessels are currently estimated at twice these last amounts for gross cost and government subsidy.

As with all capital intensive property, fixed costs of this new type of equipment are enormous. So great a discrepancy in fixed costs cannot but prove destructive to existing unsubsidized companies in competition for preference cargo, and must, if not offset at the point of collision over cargo protected against foreign competition, prevent future unsubsidized entry into American shipping.

The correct construction of title V of the Merchant Marine Act is therefore of critical importance to unsubsidized carriers challenged to meet rates for preference cargo brought below allocable costs before subsidy.

Here again no esoteric search of the record is required, since at all stages the agency treated this issue as a question of law.

The Court of Appeals recognized that "As originally enacted Title V prescribed criteria for awarding CDS similar to those for ODS, including the requirement that the vessel be used in a service which was meeting foreign competition." 518 F.2d at 1083, App. A-26.

However, the Court found significant the deletion of this foreign-competition clause in 1952, and a further amendment in 1970 allowing subsidies to be paid to shipyards as well as ship-owners.

Despite these changes, there is solid proof that the original limitation to meeting foreign competition continues in full force. On established principles of statutory construction, the intent of the law, gathered from its history, must be allowed to illuminate a seeming discrepancy, which if given literal effect would produce stultifying consequences. FTC v. Jantzen, 386 U.S. 228, 87 S.Ct. 998 (1967); Gerasco v. Walling, 324 U.S. 244, 65 S.Ct. 605 (1944), affirming Guiseppi v.

Walling, 144 F.2d 608 (2d cir. 1944); FTC v. Standard Motors Products, 371 F.2d 613 (2d cir. 1967); FMC v. DeSmedt, 366 F.2d 464 (2d cir. 1966), cert. denied 385 U.S. 974, 87 S.Ct. 513 (1966).

1. The 1952 amendment did not eliminate foreign-flag competition as the condition of construction subsidy.

Until 1952, § 501(a) read: "No such application shall be approved by the Commission unless it determines that (1) the *service, route or line requires a new vessel* of modern and economical design *to meet foreign-flag competition* and to promote the foreign commerce of the United States".

In 1952 this clause was amended to read: "No such application shall be approved by the Secretary of Commerce unless he determines that (1) the plans and specifications call for a new vessel which will meet the requirements of the foreign commerce of the United States, [and] will aid in the promotion and development of such commerce, etc.".

The extensive legislative history shows that Congress intended by the amendment to strengthen certain carriers expressly to *meet* foreign competition, not to eliminate the requirement of foreign competition which constitutes the whole conceptual base of the differential-subsidy system.

It did this by making tramps and certain liners (then ineligible because not tied to a "service, route, or line") eligible for construction subsidy through the mechanism of striking the trade-route clause from § 501(a). The articulated purpose of the amendment was to enable services of this kind "*to maintain competitive foreign services.* It is to our interest to retain those services if

possible, but because of the higher cost of American over foreign construction, it is apparent that the shipping companies not receiving the operating subsidy must be placed in the position to modernize and replace their fleets *if they are to continue to compete with the lower cost foreign company.*" S. Rep. 295 [To accompany S. 241], 82 Cong., 1st sess. p.9. To exactly the same effect, H. Rep. 1407 [To accompany H.R. 5346], 81 Cong., 1st sess. pp. 7-8; H. Rep. 2221, 82 Cong., 2d sess. pp. 6-7; see House Hearings pp. 17, 41; Senate Hearings on S. Res. 50 and S. 2786, 81 Cong., 2d sess. pp. 109-110, 146; 265, 1866, 1867, 1431, 1434. And again (responding to Administration comment): "This position is a clear-cut admission of fact that *construction aid to that shipping which meets foreign competition is essential* if we are to have a fleet adequate for our national defense and to serve our commerce. To this extent the Executive position conforms completely with the conclusions of your committee. . . . *our shipping cannot successfully compete against foreign operators without construction aid.* If we are to meet our national shipping needs, operators must be in a position to plan ahead." S. Rep. 295, Part 2 [To accompany S. 241]. 82 Cong., 1st sess. p. 5.[7]

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[7]The spokesman for the subsidized lines testified in supporting the bill, which had in fact apparently been drafted by his organization, that the standard of liner service on fixed trade routes was what the legislation aimed to relax, thereby extending construction subsidy to ship-owners "*as long as they meet foreign competition* and operate under the terms otherwise prescribed in the Act." Senate Hearings on S. Res. 50 and S. 2786, p. 110.

Amendments so precisely designed to enhance the power of American shipping companies to compete could not have the stultifying object of repealing the duty to compete at all. No word can be found in the legislative history to suggest any such intention or even discussing it, let alone to demonstrate that the words about meeting foreign competition were advertently dropped for the deliberate purpose of eliminating the requirement. Although the complete absence of discussion in the elaborate legislative history suggests a drafting inadvertence, there is a reasonable explanation, consistent with the evident purposes of the 1952 amendment, why in addition to "service, route or line", the expression "to meet foreign-flag competition" gave way to "meet the requirements of the *foreign* commerce of the United States".

It may have been thought that the change was needed in order to allow construction subsidy to meet foreign competition that was not directly parallel on a given route. The final form of §§ 501 and 601 as originally enacted in 1936 was a compromise between a version that would have granted construction and operating subsidies "to meet direct or indirect foreign-flag competition" (S. 3500, 74 Cong., 2d sess. §§ 501(a)(1), 521(1), Committee Print of March 3, 1936) and a version that would have denied all recognition to indirect competition as being "of a highly questionable character" and "remote and indefinite" (comments of Senator Guffey, Senate Hearings on S. 3500, 74 Cong., 2d sess. at 123, and see his bill S. 4110, §§ 23(a), 32(a)). In the compromise, indirect competition was entirely excluded as the basis for construction subsidy, and subjected to a high standard of proof with respect to operating subsidy by

the addition of § 602. Hearings on S. 3500, supra, at 62; and see § 602 as enacted, 46 U.S.C. § 1172. Under § 501 itself, construction subsidy was prohibited "unless . . . the service, route or line requires a new vessel . . . to meet foreign competition", an expression that, lacking a clause equivalent to § 602, clearly was limited to competition directly on the service, route or line.

Reading the clause as thus allowing subsidy only to meet competition directly *on* the service, route or line, Congress might have thought that the whole clause must be altered to admit indirect competition such as was likely to be usual in the more flexible services now rendered eligible although not tied to a particular "service, route or line".

This explains also why in 1970, amending § 601 to make the same class of carriers eligible for operating subsidy, Congress found it necessary to change only the "service, route or line" phrase, leaving the original competition clause intact, already modified as it was by § 602 in respect of indirect foreign competition. In neither case was there any intention to eliminate the substantive prerequisite to granting subsidy. ". . .[C]onstruction aid to that shipping which meets foreign competition is essential". S. Rep. 295, Part 2, supra, at 5.[8]

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[8]Compare Independent Bank v. FRS, 516 F.2d 1206, 1219 (D.C. Cir. 1975), for a closely analogous construction of an amendment that dropped a critical clause from a statute, where the complete absence of legislative discussion was deemed to show no substantive change was intended as to the subject covered by this clause. There, too, the real change Congress purposed made the law somewhat more flexible than the clause would literally have allowed, and the latter was therefore deleted without repealing its application.

That the new § 501 expression, "meet the requirements of the foreign commerce of the United States", incorporates this expanded conception of competition is plainly illustrated in the 1970 amendment to § 905(a), which is intelligible only as an extension of the same principle to cross-trading between foreign countries.

As amended in 1970 (and again in 1972, P.L. 92-402, 86 Stat. 617), this section defines "foreign commerce" as "commerce ... between the United States ... and a foreign country, except that *in the context of ... title V of this Act concerning construction-differential subsidy*, the said words 'foreign commerce' ... shall also include, in the case of liquid and dry-bulk cargo carrying services, trading between foreign ports in accordance with normal commercial bulk shipping practices in such manner as will permit U.S.-flag bulk vessels freely *to compete* with foreign-flag bulk carrying vessels in their operation or *in competing* for charters ...". This language really says that such carriers may *not* be subsidized for the additional range *except* in order to meet foreign competition. See Conference report, H. Rep. 91-1555 [To accompany H.R. 15424] p. 7.[9]

It makes explicit for these carriers what is necessarily implied for all carriers in the very nature of the differential-subsidy system, which is based on the theory that Americans are at a cost disadvantage in

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[9] "... such ships must move from area to area and sometimes from foreign to foreign destinations before returning to the United States in order to compete in the world trade." See the agency's G.O. 111, 46 C.F.R. Part 278, and the explanation for its adoption, Pike & Fischer, Shipping Regulation Current Service p. 230:351-352.

competing with foreign operators. The common sense of the matter is that in the absence of such competition, American operators would be able to pitch their freight rates to their costs, including capital costs. They would surely not in that case require subsidy, as the agency itself has said. American South African Line, Trade Route 14, 3 USMC 314, 321 (1947); A-20, War Area or Danger Zone Bonuses, 6 SRR 651 (MSB 1965); Manual of General Procedures, Pike & Fischer, Shipping Regulation Current Service p.186:191; A-37 AEIL–ODS Application, Trade Route 5-7-8-9, 11 SRR 193 (MSB 1969).

So a high capital investment is a disadvantage only if exposed to continuing collision with a lesser investment in competitive equipment of equivalent efficiency. That is the sense of the act.[10]

2. The agency interpreted the amended act to retain the foreign-competition requirement.

Demonstrating that the agency itself did not consider the 1952 amendment to have repealed the requirement for foreign competition, five years after this amendment it promulgated its Manual of Procedures-Construction-Differential Subsidy, SR Current Service, p. 210:102, dated 1957 but some years in preparation:

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[10]Note the comment of the House Committee on Merchant Marine and Fisheries in connection with P.L. 89-127 (1965), 79 Stat. 519, extending the then 55% construction subsidy in order to maintain parity with foreign competition: "*Without adequate Government contribution to the shipbuilding program to keep the American operator on a parity with his foreign competitor*, he will be unable to proceed expeditiously with his replacement requirements." H. Rep. 214, 89 Cong., 1st sess. (1965) p.2.

"Upon receipt . . . of an application for construction-differential subsidy, the Maritime Administration will: 1. Review the proposed ship commercially required . . . in terms of the following: . . . (c) Whether the ship will meet the requirements of the foreign commerce of the United States; will aid in the promotion of such commerce and *will meet foreign-flag competition* and the commercial requirements of the intended route, line and service". This rule is otherwise in the language of the 1952 amendment of § 501, so that its explicit competition clause is the agency's own more nearly contemporary gloss on the meaning of the amended act. So far as appears, this regulation is still in effect.

In other formal action, the agency has held payment of construction subsidy to be justified only to meet foreign competition. American President Lines – Mechanization of Ships, 3 SRR 757, 762 (MSB 1964); United States Lines – Reconstruction Subsidy, SS UNITED STATES, 2 SRR 865 (MSB 1963). In the one case subsidy to mechanize vessels was allowed for improving competitive power, in the other it was refused on the ground that the proposed improvement had only a conjectural tendency to improve competitive ability.

3. The Court's "shipyard-subsidy" theory is in error.

The Court below says, however, that another amendment in 1970, which made shipyards eligible to apply for construction subsidy, in effect converted that subsidy from a subsidy for ship-owners to one for shipyards. 518 F.2d at 1083, App. A-27. The 1952 amendment, critical here, made no such change. Not

merely did owners alone remain eligible for subsidy, but the committee reports stressed the pervasive philosophy of the act that the subsidy was designed to assist *operators* in competing with foreign services: ". . . our *shipping* cannot successfully compete against foreign *operators* without construction aid. If we are to meet our national shipping needs, *operators* must be in a position to plan ahead." S. Rep. 295, Part 2, 82 Cong., 1st sess. p. 5.[11]

The language that the Court's opinion cites in support of its shipyard-subsidy theory appears in H. Rep. 91-1073, 91 Cong., 2d sess. p. 30. However, this language was drawn from testimony of the Maritime Administrator in proposing an amendment that would have limited eligibility for construction subsidy exclusively to shipyards, altogether eliminating ship operators. House Hearings on H.R. 15424, 91 Cong., 2d sess. [Serial No. 91-23] p. 211. This innovation was not adopted, and the language of the House report does not appear either in the Senate report, S. Rep. 91-1080, pp. 26-27, or in the Conference report, H. Rep. 91-1555.

In fact, although shipyards were made eligible[12] along with ship operators, none has ever applied for a

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[11]The amount of the subsidy continued to be the excess of American cost over foreign, and to be designated as "the reduction in selling price". § 502(b), 46 U.S.C. § 1152(b) [1958 ed.]. No change was made in 1970. The shipyards in fact were not competing and do not compete against foreign yards for American subsidized shipping, as the Court suggests, since all such shipping is required to be constructed in American yards. § 505, 46 U.S.C. § 1155.

[12]For a different reason: "The purpose of this amendment is to encourage shipyards to participate in the design work on the vessels." S. Rep. 91-1080, p. 26.

subsidy, and all 65 vessels built under title V since the act was passed in 1970 have been subsidized on the application of operators.

Nor would the change of philosophy, if it had occurred, have been material for present purposes. It remains the owner of the vessel, not the shipyard, who must agree to operate the vessel under American flag, § 503, and exclusively in the foreign trade of the United States, § 506; and if in such foreign trade the vessel touches on certain permitted domestic ports, it is the owner who must repay the construction subsidy in proportion to the gross revenue from the domestic calls. Id. Finally, the owner is so far considered the direct beneficiary of the construction subsidy that just compensation payable to him in case of government requisition is the value of the vessel less such subsidy, § § 802, 902(b), 46 U.S.C. § § 1212, 1242.

CONCLUSION

Wherefore petitioner respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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